No. 166.

Brf. of T. B. Catron for Appellee

SUPREME COURT U. S.
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JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

Filed Feb. 24, 1900.

UNITED STATES.

OCTOBER TERM, 1899.

No. 166.

WILLIAM CARMICHAEL, ET AL,

vs.

FRANCIS X. EBERLE.

In Error to and Appeal from the Supreme Court of the Territory of New Mexico.

Brief of Appellee and Defendant in Error.

T. B. CATRON,
Attorney for Eberle.

NEW MEXICAN PRINTING CO., SANTA FE.

In the Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 166.

William Carmichael et al,
vs.
Francis X. Eberle.

WRIT OF ERROR AND APPEAL.

The appellee, Francis X. Eberle, in the above entitled cause, suggests to the court that said cause is appealed to this court solely in respect to the action of the Supreme Court of the Territory of New Mexico without reference to what was done in the district court. That such being the case, it stands here as the trial by the supreme court of the questions on which the appeal is taken. That there is no statement of facts by the supreme court of New Mexico, as required by section 2, chapter 80, of an act approved April 7, 1874, 18 Stat. L., 27. And as said cause is not a proper case for a writ of error, said appellee, Francis X. Eberle, moves the court to dismiss the writ of error because it does not lie in such case and to dismiss the said appeal because there is no statement of facts in accordance with the statute aforesaid.

In case the court should over-rule the foregoing motion, Appellee Francis X. Eberle makes the following

STATEMENT OF FACTS.

Said cause, as commenced in the district court for the county of Socorro, New Mexico, was an action in ejectment. It was tried by a jury in the district court of said county, and was for the possession of three mining claims adjacent to each other, called respect ively: Clifton, Lexington, and Andrew Jackson, situate in the Mogollon mining district, County of Socorro. As appears by the record, the trial of the case occupied about a week. A large amount of evidence was introduced by the plaintiff in the court below (Francis X. Eberle) which is not included in the record. On the conclusion of plaintiff's case, the court directed a verdict in favor of the plaintiff as to the Clifton claim, and that the jury find the defendants not guilty as to the Lexington and Andrew Jackson claims. The defendants in that court, afterwards stipulated that the plaintiff was entitled to one-sixth part of the Andrew Jackson claim, to which stipulation plaintiff was not a party. Judgment was entered in accordance with the verdict and said stipulation. Plaintiff thereupon moved the court for a new trial and in arrest of judgment, both of which motions are in the printed record. The court overruled both the said motions and the case was taken by the plaintiff in the court below to the supreme court of the territory by writ of error, to review the same, and a record containing all of the proceedings and evidence was presented to the supreme court of the territory.

The cause was heard in the supreme court of the territory and a decision in favor of the plaintiff and judgment thereon rendered, (see printed record 16, fo. 28,) reversing the judgment of the lower court and remanding the same to said court with directions for a new trial, and with judgment for costs. The opinion appears in the printed record at page 22 *et seq.*

This opinion finds that all three of the mining claims

had been conveyed to the plaintiff in the court below prior to the time he commenced his suit, and prior to such conveyance, they were held in common by the plaintiff and John E. Eberle and Lankford Johnson, under an oral agreement, and that all annual work and labor had been done on the same in common for the benefit of all said mines or claims during each year. The appellants here and the defendants in the court below, moved the supreme court of the territory for a re-hearing. (See printed record 16, fo. 30.)

Upon filing said motion, the court adjourned until the next term in course and continued all causes not otherwise disposed of. (Page 18, fo. 32.)

Afterwards at the July term, 1896, and on the 11th day of August, 1896 of said term. the following entry in said cause (appears on page 18, folio 33, of said record) was made:

> This cause coming on for hearing, upon the motion of said defendants in error, heretofore filed herein *for a rehearing of said cause*, the same is argued by H. L. Pickett, Esq., attorney for said defendants in error, and by T. B. Catron, Esq., attorney for said plaintiff inerror, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

Afterwards on the 18th day of December, 1896, the court passed upon said motion, denying the same, as appears by the judgment entered pages 18 and 19, folios 33 and 34, which judgment is somewhat peculiar in its terms but it distinctly shows it was a judgment rendered upon the motion asking for a rehearing, and on which motion it appears by the said judgment that the court was divided. The court thereupon in the same judgment, simply reiterated the former judgment entered on the 16th day of October, 1895. (Page 16, folio 28.) Thereupon, the defendants in the court below moved the court to set aside the entry made in said cause on the 11th day of August 1896, (Record

page 18, folio page 33,) and to enter *nunc pro tunc* in place of said entry an order granting to the appellees in said cause, a rehearing, and also that the court set aside the judgment of reversal in said cause on the 18th day of December, 1896; (Record page 16, folio 28,) and enter in lieu thereof, an order affirming the judgment of the court below, claiming that a rehearing had actually been granted and the cause itself re-argued; (Not the motion—the entry on December 18 shows the motion itself was argued and not the cause.) This motion was considered by the court and judgment thereon was entered on March 1st, 1897, in the following words :

> This cause having been submitted on motion to amend the record to make an entry *nunc pro tunc* granting the defendants in error a hearing on a former day of this term, the court announces its decision by Chief Justice Smith, *the associate justices concurring*, denying said motion. It is therefore considered and adjudged by the court that the motion to amend the record and make an entry *nunc pro tunc* be, and the same hereby is, denied.

Whereupon the defendants in error in the Territorial Supreme Court took an appeal to this court and also sued out a writ of error from this court to the supreme court to review said action of the Supreme Court of the Territory in overruling said motion last referred to.

ARGUMENT.

This case seems too plain and simple to require any citation of authorities.

It is submitted that the Supreme Court of New Mexico, having by a majority reversed the judgment of the district court and remanded the cause for a new trial, that was the final determination of the cause, except so far as it was retained to determine whether the court would allow a motion for a rehearing, which

was presented to the court. After the presentation of that motion, the court adjourned until the next term continuing all causes otherwise undisposed of. At the next term an application was made to the court by the defendants in error in the court below to be allowed to argue the motion for a rehearing, orally, which was granted, but this does not appear in the record, but was allowed. The motion was thereupon argued orally by both parties, and when that fact is taken into consideration, it explains what might be considered an apparent peculiarity in the judgment (on pages 18 and 19, folios 33 and 34).

The court will observe that the first part of that entry is as follows:

> This cause having been argued by counsel and submitted to and taken under advisement, by the court on a former day of the present term *upon the motion* of the said defendants in error for rehearing of said cause granted herein at a former term.

This shows plainly that the argument was upon the motion. What is meant then by the words "granted herein" is explained by the fact that an oral argument which was not permitted by the rules of the court upon the motion for a rehearing was granted. There is no record anywhere, showing that a rehearing was granted in the cause except the language above quoted should be so construed absolutely. The judgment which was entered at a former term was absolute and conclusive. The entry in regard to the motion for a rehearing and the only one in the record was made at the same time as the entry last quoted, and that was merely an entry showing that the motion had been argued by the counsel for plaintiff and defendant, and while it does not show that leave was granted to argue orally, it does show quite clearly that there was an oral argument by the counsel which was in contravention of rule 21 of the supreme court

of New Mexico, which rule is in the words following:

> A motion for rehearing after judgment, can be presented, only, at the term at which the judgment is entered unless by special leave granted during the term, and must be filed within ten days after such judgment, if the term shall so long continue.
>
> No motion for rehearing shall be filed unless in the ground or grounds of said motion it shall distinctly point out that some question decisive of the cause and duly submitted by counsel, has been overlooked by the court, or that the decision of the court is in conflict with some controlling decision or provision by statute, to which the attention of the court has not been called, through the oversight or neglect of counsel. Such motion shall be considered by the court without oral argument, but may be supported by printed brief but will not be granted or permitted to be argued unless a justice who concurred in the judgment, desires it, and a majority of the court so determines.

ne as rule 1894.

Which is the rule of the territorial supreme court, as now in force, and is practically and almost identically the same as rule 22 in force in 1894, cited on page 4 of appellant's brief.

This rule, when read in connection with the motion for rehearing and the two entries made thereon in the record pages 18 and 19, folios 33 and 34 shows plainly what is intended by the entry in the record of December 18, 1896. The rule provides that no motion for rehearing shall be granted or permitted to be argued unless a justice who concurred in the judgment desires it and a majority of the court so determines. It is evident that that entry refers to the argument on the motion, and that the argument referred to in the rule was what was granted and that that meant an oral argument. The motion, however, could not have been granted, that is, the rehearing allowed under that rule unless a majority of the court so determined, and the entry of December 18 distinctly shows that there was no majority of the court doing so.

That entry also shows a judgment of the court, in the latter half of it, which seems to be the judgment of that entire court, simply re-affirming the same judgment which had been made at the former term—that is, it reiterates substantially the same judgment.

The appeal in this case is evidently based upon the theory that the Supreme Court of New Mexico did not know what it was doing or what it had done. If there should be any doubt as to that proposition, the same certainly is solved by the judgment of the court made upon the motion to correct the record *nunc pro tunc*. On page 20 of the printed record the court passing upon that motion to have the record corrected *nunc pro tunc*, denies the same in the following words:

> This cause having been submitted on motion to amend the record and make an entry *nunc pro tunc*, granting the defendants in error a rehearing, on a former day of this term, the court announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion. It is therefore considered and adjudged by the court, that the motion to amend the record and to make an entry *nunc pro tunc* be, and the same hereby is, denied.

Here the court's attention was called to everything that it had done, and in the motion, it was claimed that a rehearing had previously been granted. The effect of the judgment of the court on that motion is to say that no rehearing had been granted. And even if it had, that the judgment should stand as it was of record, without any correction. Certainly there is no entry in the record changing the judgment or showing that it ever had been changed, but both entries, the one of the same term and the one of the preceding term are judgments of reversal, and the last entry, asking a correction of the same is the judgment of the entire court—all concurring, that the judgment should not be modified, but in effect that it should stand as it appears on record. That

certainly is the last judgment of the territorial court, and it seems to be conclusive, not only as to what they had done and had intended to do, but as to what they intended should remain as a final result.

The justices of the supreme court of New Mexico possibly might have disagreed upon some one point in the case and still have found enough in the entire record of the territorial supreme court to reverse the judgment of the district court, notwithstanding their disagreement upon one question, even if it should be supposed that a rehearing had actually been granted, and upon the rehearing, an equal division upon some point, because if such should be supposed still that same judgment is the judgment of the whole court reversing the case.

The last judgment of the territorial supreme court denying the motion to correct the record and make entries *nunc pro tunc* is the action of *all* the justices of that court and is the re-affirmation in substance of the judgments previously entered in that court, and shows what the court meant.

It is respectfully submitted that there is nothing in this record which would justify this court in reversing the judgment of the court below.

T. B. CATRON,
Attorney for
F. X. EBERLE,
Appellee and Defendant in Error.